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Donald Leffers
Carleton University

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Developers, the State, and the Politics of Private Property Rights

DONALD LEFFERS*

Cet article utilise une nouvelle approche institutionnaliste pour étudier certains conflits importants et certains changements de politiques relatifs à l'utilisation des terres qui ont eu un impact sur les relations de propriété des promoteurs immobiliers. Les approches institutionnalistes se concentrent sur le rôle d'acteurs, d'idées et de stratégies clés qui influencent les trajectoires des institutions politiques, et les manœuvres politiques et stratégiques face aux institutions et aux structures existantes. En comparant les processus qui ont mené à la promulgation de deux lois importantes sur l'utilisation des terres régionales – la *Loi de 2001 sur la conservation de la moraine d'Oak Ridges* et la *Loi de 2005 sur la ceinture de verdure* – le présent article examine le rôle des relations entre les acteurs politiques et les promoteurs immobiliers, et du climat politique sous-jacent, relativement au développement de ces lois et à leurs conséquences. L'article démontre que ces deux lois environnementales sur l'utilisation des terres, qui ont toutes deux des conséquences importantes sur les droits de propriété privée des propriétaires fonciers, comportent des différences significatives à la fois relativement à leur développement et à leur promulgation. L'article révèle aussi que la promulgation de lois provinciales sur l'utilisation des terres et leurs effets sur les droits de propriété privée font l'objet de plus importantes négociations et contestations politiques, et produisent des résultats moins prévisibles que ce qui était auparavant envisagé par le nouvel institutionnalisme. Cet article se fonde sur des études de cas pour illustrer les différentes façons dont les promoteurs immobiliers et les décideurs gouvernementaux clés exercent leur pouvoir, en travaillant à l'intérieur des structures juridiques existantes et contre celles-ci, pour faire avancer des agendas particuliers d'utilisation de l'espace urbain.

This article uses a new institutionalist approach to investigate major land use conflicts and regional land use policy changes in the Toronto region that affected the property relations of land developers. Institutional approaches focus on the role of key actors, ideas, and strategies in influencing the trajectories of political institutions, and the confrontation of political and strategic maneuvering in the face of existing institutions and structures. Through comparison of the processes driving enactment of two major regional land use statutes—the *Oak Ridge Moraine Conservation Act* and the *Greenbelt Act*—this article pays close attention to the relationships between political actors and land developers, as well as the underlying political climate in shaping the development and outcomes of these statutes. This article shows that these two environmental land use

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Donald Leffers is an instructor in the Department of Geography and Environmental Studies at Carleton University in Ottawa, Canada. His research interests include land use and conflict, urban politics, planning theory, and socio-legal theory. Thanks to Gerda Wekerle, Alex Flynn, and Janet Mosher for helpful comments and conversations around the topics of land use and property, and for precise and helpful feedback on this paper. Thanks also to two anonymous reviewers for their insightful comments and feedback.

statutes, which both had significant implications for the private property rights of land owners, differed in important ways in both their development and enactment. This article also shows that the enactment of provincial land use laws and their effects on private property rights are subject to greater political negotiation and contestation, and more unpredictable outcomes, than previously considered within new institutionalism. This article draws on case study research to illuminate the varied ways that land developers and key governmental decision makers exercise power, working within and against existing legal structures to forward particular agendas vis-à-vis urban land use.

THIS ARTICLE INVESTIGATES ENVIRONMENTALLY BASED LAND USE CONFLICTS and policy changes in the Toronto region to examine the relationships among the state, land developers, and private property rights.¹ It compares two related Toronto region environmental conservation statutes, the *Oak Ridges Moraine Conservation Act, 2001*² and the *Greenbelt Act, 2005*³, paying particular attention to the role of government agendas and land developers' property interest claims in shaping the parameters and functions of these statutes. Although differing in detail, both statutes represent attempts to reconcile tensions between land extensive urban development (i.e., sprawl) and preservation of the "countryside," broadly defined. The *Oak Ridges Moraine Conservation Act* was passed 13 December 2001 under the provincial Ontario Progressive Conservative government led by then Premier Mike Harris.⁴ The Progressive Conservatives were defeated in 2003 by the Liberals led by Dalton McGuinty, who took office 23 October 2003. Under the McGuinty government, the *Greenbelt Act* was passed 28 February 2005.⁵ A central issue underpinning this investigation of the *Oak Ridges Moraine Conservation Act* and the *Greenbelt Act* is the notion that although these environmental statutes have some similarities, they involved and affected land developers very differently. The purpose of this article is to critically examine the varied ways that land developers attempt to influence the formulation and

¹ By property law I am referring to property law in land (real property) or what is sometimes termed "land law;" e.g., Kevin Gray & Susan F Gray, *Land Law*, 7th ed (Oxford: Oxford University Press, 2011) [Gray & Gray, *Land Law*]. Denise Johnson suggests American property law comes from common law, statutes, and the Constitution. Denise Johnson, "Reflections on the Bundle of Rights" (2007) 32:2 Vt L Rev 247 at 248. While this might also broadly describe property law in Canadian common law jurisdictions, matters of organization, jurisdiction, and governance frameworks are also important. For example, in Canada, under the constitutional regime of federalism, the regulation of privately owned land is primarily a provincial responsibility, although the administration of land use is mainly municipal. David Pond, "Institutions, Political Economy and Land-use Policy: Greenbelt Politics in Ontario" (2009) 18:2 Environmental Politics 238 at 239 [Pond, "Greenbelt Politics"]. The provincially delegated authority of municipal councils to enact zoning and other by-laws is the primary tool through which private land use is regulated in Canadian cities, and the legal land use framework protects owners of private property insofar as it includes rules for fair, transparent, and predictable municipal planning procedures, such as zoning by-law changes and the processing of development applications. Ian Rogers & Alison Butler, *Canadian Law of Planning and Zoning*, 2nd ed (Toronto: Thomson Carswell, 2005) [Rogers & Butler]. Provincial quasi-judicial tribunals also play a role in enacting property law in Canada. In Ontario, the Ontario Municipal Board (OMB) adjudicates land use disputes. Environment and Land Tribunals Ontario, The Ontario Municipal Board (Toronto: ELTO, 2015), online: <elto.gov.on.ca> [perma.cc/WHK4-Y5HU].

² *Oak Ridges Moraine Conservation Act, 2001*, SO 2001, c 31 [*Conservation Act*].

³ *Greenbelt Act, 2005*, SO 2005, c 1 [*Greenbelt Act*].

⁴ *Conservation Act*, *supra* note 2.

⁵ *Greenbelt Act*, *supra* note 3.

effects of land use legislation, and the political maneuvering developers and policy makers navigate as they attempt to exercise power to serve their own interests and agendas.

With a view to more explicitly foregrounding legal structures and practices and property rights claims within urban and planning scholarship, this article pays close attention to the ways that state actors and agencies confront and mobilize specific legal tools to navigate often competing agendas of environmental protection and economic growth. Broadly informed by new institutionalism,⁶ I illuminate different forms of state power to regulate land use, as well as the power of land developers to assert their claims to private property rights. I draw on this approach to highlight how political actors, working within institutional boundaries, can shape the legal geographies of land use and property rights for particular purposes. Certain strands of institutionalism, most notably “third-phase institutionalism,” place particular emphasis on how strategic political agencies and actors mobilize to navigate opportunities and constraints to institutional change.⁷ Historical institutionalism, on the other hand, attempts to account for and theorize institutional stability and change.⁸ Within the existing historical institutionalism literature, the rights of private property holders often appear to be stable, functioning to protect the expectations of owners.⁹ Yet in practice, the strategic regulation of land use, especially during periods of crisis, means that these rights are far from stable, and the changes both gradual and dramatic.¹⁰ Drawing on new institutionalism, notably third-phase and historical institutionalism, this article contributes to a growing literature in urban geography, planning, and socio-legal studies that critically examines the complex workings of property and property law.¹¹ This article advances scholarship on new institutionalism by extending its application to understanding the complexities of land use planning and disputes. By highlighting different outcomes from two land use disputes, this article also critiques overly structuralist tendencies within some historical institutionalist analyses, which have at times downplayed the role of power, politics, and conflict in triggering changes in the land use planning “system.” At the same time, this article, by employing an institutional approach, enhances understanding of urban planning, and socio-legal theory and conflict, especially by emphasizing the often unpredictable factors at play in the creation and resolution of land use conflict, and the often discounted role of key actors and ideas in shaping the outcomes of planning decisions. This article provides an example of what David Pond refers to as government “activism” regarding land use regulation,¹²

⁶ Vivien Lowndes & Mark Roberts, *Why Institutions Matter: The New Institutionalism in Political Science* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2013) at 116, 117 [Lowndes & Roberts]; Jan Olsson, *Subversion in Institutional Change and Stability: A Neglected Mechanism* (London: Palgrave, 2015) at 23, 24 [Olsson].

⁷ Olsson, *supra* note 6 at 24.

⁸ E.g. see generally Sven Steinmo, Kathleen Thelen & Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992).

⁹ John A Lovett, “Property and Radically Changed Circumstances” (2007) 74:4 Tenn L Rev 463 at 466.

¹⁰ André Sorensen, “Evolving Property Rights in Japan: Patterns and Logics of Change” (2011) 48:3 Urban Studies 471 at 472 [Sorensen]; see, generally, José María Tubío-Sánchez, et al “Institutional Change in Land Planning: Two Cases from Galicia” (2013) 21:8 European Planning Studies 1276.

¹¹ See, for example, Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) [Blomley]; Eric Freyfogle, “Property and Liberty” (2010) 34:1 Harv Envtl Law Rev 75 [Freyfogle]; Donald Krueckeberg, “The Difficult Character of Property: To Whom Do Things Belong?” (1995) 61:3 Journal of the American Planning Association 301 [Krueckeberg].

¹² Pond, “Greenbelt Politics,” *supra* note 1 at 244.

and gives case study details to what Marcia Valiante and Anneke Smit describe as the “wide latitude” that planning authorities have to make decisions that affect private property rights in Canada.¹³

This article proceeds as follows. Section I outlines connections in planning and legal scholarship to urban land use and regulation. This section also introduces theories of new institutionalism—the theoretical framework underpinning this article—suggesting ways that new institutionalism can contribute to addressing gaps in planning and socio-legal scholarship. I then proceed to explain the case study research, which is part of a broader research project conducted between 2011 and 2013. Over this two-year period I conducted thirty interviews with suburban developers, planners, environmental activists, and politicians in order to explore the relationship between land developers and the land use planning and regulatory system in the Toronto region. I also conducted extensive document analysis, including that of provincial government debates and legislation, and coverage of these debates in local newspapers, especially the *Toronto Star* and *Globe and Mail*. In the final section, I compare the *Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005*, showing that these two pieces of environmental land use legislation differed in important ways in both their development and enactment.¹⁴ By way of conclusion I offer a number of ways that an institutional approach contributes to an understanding of legal processes governing land use. Institutional approaches focus on the role of key actors, ideas, and strategies in influencing the trajectories of land based property disputes, and the confrontation of political and strategic maneuvering in the face of existing institutions and structures.

I. PROPERTY AND THE LAW IN URBAN AND PLANNING SCHOLARSHIP

Scholarship on the role of property and the law in land use planning and regulation is growing, albeit slowly. Writing in the early 1990s, Donald Krueckeberg suggested that planning is not simply about “land use,” a seemingly objective process of categorizing and sorting activities according to their “proper” spatial location.¹⁵ Rather, Krueckeberg argued, planning is more accurately about property: a much richer concept that involves competing values of land and land use activities, competing views of the role of the state in the “intervention” in private property, and an explicit recognition that land use decisions are moral and contested, rather than rational and objective. Despite this statement of the central importance of property in planning, Amanda Davies and Mark Atkinson lament that planning theory has given property no more than cursory attention, Harvey Jacobs and Kurt Paulsen refer to property rights as a “neglected theme” in American planning scholarship, and Marcia Valiante and Anneke Smit suggest the Canadian planning literature has given little attention to the role of private property rights in the regulation

¹³ Marcia Valiante & Anneke Smit, “Introduction” in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2015) at 13 [Valiante & Smit]. They argue that this is the result of the general refusal of Canadian courts to include protection of private property rights as a Charter right. See also Ronit Levine-Schnur, “Revitalizing Land Use Law: Introductory Notes” (2017) this issue, for a discussion of a virtual absence of substantial judicial review of municipal land use law in Canada.

¹⁴ *Conservation Act*, *supra* note 2; *Greenbelt Act*, *supra* note 3.

¹⁵ Krueckeberg, *supra* note 11 at 301.

of urban space.¹⁶ There are many notable exceptions to this neglect of property in planning scholarship, especially outside of the North American context. For example, work on planning and property in the Netherlands has investigated the role of state ownership of land in controlling private speculation.¹⁷ Carrying out research on gated communities in China and England, Sarah Blandy and Feng Wang illustrate the intersections of law and power, showing that neoliberal schemes of partnership between developers and local political actors can serve to bypass existing land use policies, although the exact mechanisms of how these policies are bypassed are not discussed.¹⁸ Bhuvaneswari Raman investigates the use of planning tools in the granting of property rights to squatters in Delhi, India, as a neoliberal state project of poverty reduction.¹⁹ These studies show that rules around private property, land use regulation, and land use planning intersect in complex ways, are often politicized and influenced by exercises of power, and have immediate implications for urban development.

Although rarely writing explicitly about land use regulation and planning,²⁰ socio-legal scholars and legal geographers have had much to say about property, property rights, and land.²¹ Common planning issues, such as urban sprawl, intensification, and redevelopment confront normative and moral evaluations of how land should be used and what responsibilities owners should assume.²² The moral dimensions of property have been shown to pervade ideas of property rights, especially during conflicts over proposals for land use change.²³ As Damien Collins states, while property rights “can be *articulated* in absolutist terms, their enactment has always depended upon broad social and legal *acceptance*.”²⁴ Property rights have social and legal dimensions, the former of which are often articulated forcefully during land use disputes.

¹⁶ Amanda Davies & Mark Atkinson, “The Moderating Influence of Property Legislation on Planning Policy and Urban Form” (2012) 49:16 *Urban Studies* 3479 at 3480; Harvey Jacobs & Kurt Paulsen, “Property Rights: The Neglected Theme of 20th-Century American Planning” (2009) 75:2 *Journal of the American Planning Association* 134; Valiante & Smit, *supra* note 13 at 2.

¹⁷ Edwin Buitelaar & Arno Segeren, “Urban Structures and Land. The Morphological Effects of Dealing With Property Rights” (2011) 26:5 *Housing Studies* 661; Ary Samsura, Erwin van der Krabben & AMA van Deemen, “A Game Theory Approach to the Analysis of Land and Property Development Processes” (2010) 27:2 *Land Use Policy* 564; Terry Van Dijk & Arno van der Vlist, “On the Interaction Between Landownership and Regional Designs for Land Development” (2015) 52:10 *Urban Studies* 1899.

¹⁸ Sarah Blandy & Feng Wang, “Curbing the Power of Developers? Law and Power in Chinese and English Gated Urban Enclaves” (2013) 47 *Geoforum* 199.

¹⁹ Bhuvaneswari Raman, “The Politics of Property in Land: New Planning Instruments, Law and Popular Groups in Delhi” (2015) 10:3 *Journal of South Asian Development* 369 [Raman].

²⁰ For example, reviews of the socio-legal scholarship in legal geography and critical legal studies, although ostensibly focused on space, place, and landscape, mention little about the role of the law in urban planning, although there is some attention given to ‘municipal law,’ *e.g.*, Luke Bennett & Antonia Layard, “Legal Geography: Becoming Spatial Detectives” (2015) 9:7 *Geography Compass* 406; Chris Butler, “Critical Legal Studies and the Politics of Space” (2009) 18:3 *Soc & Leg Stud* 313; David Delaney, “Legal Geography I: Constitutivities, Complexities, and Contingencies” (2015) 39: 1 *Progress in Human Geography* 96; David Delaney, “Legal Geography II: Discerning Injustice” (2016) 40:2 *Progress in Human Geography* 267.

²¹ Katrina Myrvang Brown, “Understanding the Materialities and Moralities of Property: Reworking Collective Claims to Land” (2009) 32:4 *Trans Inst Br Geogr* 507; Blomley, *supra* note 11, Freyfogle, *supra* note 11.

²² Damian Collins, “Contesting Property Development in Coastal New Zealand: A Case Study of Ocean Beach, Hawke’s Bay” (2009) 33:1 *International Journal of Urban and Regional Research* 147 at 149 [Collins].

²³ Blomley, *supra* note 11, especially chapter 3.

²⁴ Collins, *supra* note 22 at 149.

Even though private property regimes require governmental regulation to function,²⁵ owners of real property often deploy morally based assertions of private property rights to argue against environmental policies that restrict their own land use.²⁶ Moral assertions of this variety prioritize individual economic growth opportunities, and unless environmental protection can be framed in terms of resource protection, broad political support by landowners is unlikely.²⁷ Moral assertions are far from benign, as majority support for particular claims can lead to legislatures enacting new laws.²⁸ A moral dilemma facing land use regulators' statutory power to enact regulatory measures stems from the questions of who pays for (broadly understood), and who benefits from, regulations.²⁹ Greenbelts or other urban boundary constraints, for example, might serve to increase the value and potential profits from land in the aggregate by removing supply,³⁰ but for owners whose land has been removed from the market, the costs of greenbelt legislation are very high.

Recent urban scholarship has drawn on different strands of “new institutionalism” to investigate with more nuance the governance of urban development and land use. New institutionalists generally argue that history and formal rules matter in government and governance, but local cultures, informal practices, and ideas can also shape, in important ways, how policies are developed and practiced.³¹ Drawing on the “interpretive institutionalism” of Marc Bevir and Rod Rhodes, geographers David Gibbs and Rob Krueger analyze smart growth in the Boston city-region, arguing that the governance of city-regional land use is shaped by a combination of historically inherited rules, as well as ever-evolving “traditions” and “beliefs” of political actors in land use planning and governance institutions.³² Drawing more on a structuralist form of historical institutionalism, Andre Sorensen and Paul Hess explain the Toronto region suburban development pattern as the effect of rules and systems (especially around infrastructure provision) put in place in the post-World War II period.³³ Implicit in this framing is the power of initial decisions, the path dependency of decisions that follow, and the stability of resulting systems. Absent in this framework are actors, politics, or specific mechanisms through which land use planning and governance are carried out. While Sorensen

²⁵ Carol Rose, “Liberty, Property, Environmentalism” (2009) 26:2 Social Philosophy & Policy 1 at 11 [Rose, “Liberty”]. In terms of land use, at the most basic level limitations on one individual landowner's property rights are necessary insofar as they protect the rights of others, including other landowners and the broader ‘public interest’ now and in the future. Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003) at 96 [Underkuffler]; Freyfogle, *supra* note 11 at 83.

²⁶ Collins, *supra* note 22 at 149.

²⁷ See generally, Rose, “Liberty,” *supra* note 25.

²⁸ Freyfogle, *supra* note 11 at 83.

²⁹ Kevin Gray & Susan Gray, “The Idea of Property in Land” in Susan Bright & John Dewar, eds, *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) at 24 [Gray & Gray, “Idea of Property”]

³⁰ Amal K Ali “Greenbelts to Contain Urban Growth in Ontario, Canada: Promises and Prospects” (2008) 23:4 Planning, Practice & Research 533 at 536; Yvonne Rydin, *Housing Land Policy* (London: Ashgate, 1986) at 31.

³¹ See generally, Vivien Lowndes, “Rescuing Aunt Sally: Taking Institutional Theory Seriously in Urban Politics” (2001) 38:11 Urban Studies 1953.

³² David Gibbs & Rob Krueger, “Fractures in Meta-Narratives of Development: An Interpretive Institutional Account of Land Use Development in the Boston City-Region” (2012) 36:2 Int J Urban and Reg 363 at 376; Mark Bevir & Rod Rhodes, *The State as Cultural Practice* (Oxford: Oxford University Press, 2010).

³³ André Sorensen & Paul Hess, “Building Suburbs, Toronto-Style: Land Development Regimes, Institutions, Critical Junctures and Path Dependence” (2015) 86:4 Town Planning Review 411 at 412 [Sorensen & Hess].

and Hess describe in detail the “architecture” of the rules and institutions controlling land development in the Toronto region, they emphasize the power of planners and the planning system. There is no attention paid to the politics that fuel institutional development and change, and little regard for the role of elite actors, such as land developers, in influencing the negotiation and application of planning and legal institutions. Both historical and interpretive institutionalism are much better at explaining institutional stability than change,³⁴ and the emphasis on the effects of “stable” planning and governance institutions in planning scholarship reflects this theoretical tendency. Perhaps that is why land use and property law are not much considered in these literatures—they are assumed to be objective, stable, and apolitical. On the other hand, economists and legal scholars have long surmised that property rights and the law are politically negotiated and constructed, and “evolve” over time.³⁵ But it is not simply the evolution of property rights and property law that is of interest here; rather, I am interested in the underlying characteristics and conditions at play that allow for this evolution.

Theoretically, I draw on new institutionalism, specifically third-phase institutionalism, which itself owes much to historical institutionalism, in order to more fully explain the politics of private property rights in shaping the outcomes of land use planning, development, and conflict.³⁶ Lowndes and Roberts conceptualize third-phase institutionalism as a consolidation of several strands of new institutionalism, including historical, rational choice, sociological, and discursive institutionalism. Although differing in emphasis in the importance of structural forces versus individual agency, these forms of new institutionalism seek to explain the workings of political life, and historical institutionalism privileges processes of institutional stability and change.³⁷ Third-phase institutionalism places particular emphasis on strategic political agency, especially as a key factor in institutional change.³⁸ Political agency can be described in this context as “combative acts,” where political actors consider their actions within the constraints of acceptable rules and norms, strategically evaluating which rules can be subverted and how power can be mobilized to achieve particular ends.³⁹ Constraints and prevailing rules can be actively, albeit often covertly, resisted. In this context, land use and private property rights, as well as the “planning system” with its well-defined procedures, can be considered institutions⁴⁰—sets of formal and informal rules that enable, constrain, or shape in some way social interactions and outcomes.⁴¹ In this sense, private property rights, as Demetrio Muñoz-Gielen states, are a type of

³⁴ See, generally Guy B Peters, *Institutional Theory in Political Science: The New Institutionalism*, 3rd ed (New York: Continuum, 2012); Vivien Schmidt, “Taking Ideas and Discourse Seriously: Explaining Change Through Discursive Institutionalism as the Fourth ‘New Institutionalism’” (2010) 2 *European Political Science Review* 1.

³⁵ E.g., Terry P Anderson & PJ Hill, “The Evolution of Property Rights: A Study of the American West” (1975) 18:1 *JL & Econ* 163; Oona A Hathaway, “Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System” (2001) 86 *Iowa L Rev* 601.

³⁶ Lowndes & Roberts, *supra* note 6; Olsson, *supra* note 6.

³⁷ Olsson, *supra* note 6.

³⁸ Olsson, *supra* note 6 at 26.

³⁹ *Ibid.*

⁴⁰ John Brigham, *Property and the Politics of Entitlement* (Philadelphia: Temple University Press, 1990) [Brigham].

⁴¹ Timothy C Lim, *Doing Comparative Politics: An Introduction to Approaches and Issues*, 2nd ed (Boulder: Lynne Rienner Publishers, 2010) [Lim].

formal rule that can “decisively influence power relations between public and private actors.”⁴² The institution of private property, in a new institutionalist framework, is not simply a rational system for maximizing individual preferences, nor is it simply the product of larger political, social, or economic systems. Private property rights are continuously claimed and contested in a complex institutional setting that has the potential to change in various ways for different reasons.⁴³ Analyzing the outcomes of property disputes, then, becomes a matter of investigating the particular events, actors, and ideas that shaped the disputes. In my case study, for example, I show that electoral politics and pre-existing state-corporate relationships were important factors shaping land use legislation that affected existing private property rights. Examining how political elements shape private property interests requires close attention to governance cultures and context-specific strategies to understand how land use policies are developed and enacted in practice. Furthermore, I show how specific decisions about property not only have material and geographical consequences, but also how specific places and actors influence property decisions in particular ways. These decisions are shaped in tangible ways by local politics and actors, leading to highly place-based material consequences.

Changes in land use legislation are often politically charged, as they can directly impact owners of private property. Christopher Rodgers notes that private property rights can shift in practice when, for example, authorities enact new laws that change the property rights of owners.⁴⁴ Land use legislation, as Carol Rose notes, is often rationalized based on the “public interest,” which can have multiple meanings based on particular spatial and temporal contexts.⁴⁵ What constitutes the public interest, and therefore the parameters of state regulation of land use, is a matter of history, framing, contestation, ideology, strategy, and so on. Laura Underkuffler notes that the values underlying property claims can be spatially and temporally fluid.⁴⁶ As Raman notes, “property rights and relations are continuously being reconfigured out of contests over meaning, boundaries and the mutual constitution of property and social relations, including state-citizen relationships. The state, by virtue of its role as a guarantor of property, plays a key role in defining, establishing and enforcing property boundaries.”⁴⁷ But state actors and agencies act strategically to navigate the rules and external pressures to manage conflict and achieve political goals, such as economic development or environmental protection. In other words, how and under what conditions political actors influence “property rights and relations,” to use Raman’s phrasing, is an important question for empirical investigation. The next section turns to a case study in the Toronto region, highlighting the complexity of planning, property rights, and land use law as tools ostensibly mobilized to protect the environment, and the power of developers to shape the content and use of these tools.

⁴² Demetrio Muñoz-Gielen, “Urban Governance, Property Rights, Land Readjustment and Public Value Capturing” (2012) 21:1 *European Urban and Regional Studies* 60 at 61.

⁴³ Sorensen, *supra* note 10 at 480. Sorensen lists court decisions, citizen activism, and elections as some of the forces triggering institutional change, although he notes change is often slow, taking the form of two steps forward and one step back.

⁴⁴ Christopher Rodgers, “Nature’s Place? Property Rights, Property Rules and Environmental Stewardship” (2009) 68:3 *Cambridge LJ* 550 at 564 [Rodgers].

⁴⁵ Carol Rose, “Property and Expropriation: Themes and Variations in American Law” (2000) 1 *Utah L Rev* 1 at 1 [Rose, “Property and Expropriation”]

⁴⁶ Underkuffler, *supra* note 25 at 93.

⁴⁷ Raman, *supra* note 19 at 389.

II. REGULATING PROPERTY IN THE TORONTO REGION

The Oak Ridges Moraine (ORM), located north of Toronto, Canada's largest city, is an approximately 160 km long east-west trending geological landscape formed through glacial till deposition (Figure 1).⁴⁸ The ORM consists of complex layers of bedrock, sand, gravel, and other glacial deposits; lakes and marshes drain into these layers, and several aquifers of varying depths feed a network of rivers and streams with a continuous flow of groundwater.⁴⁹ The ORM, especially since the mid-1990s, has become framed as a sensitive landscape based on its ability to store and filter groundwater.⁵⁰ But as part of it is within Canada's largest urban region, the ORM has also been the site of intense development pressure, and suburban developers have come to see it as an ideal location to house an ever-expanding population. This section outlines the history of this development pressure and the land conflict it triggered when development was resisted by environmental and homeowner groups, as well as by some municipal councils and planning authorities. It then documents the provincial government's response to the conflict. In doing so, this section delves into specific negotiations the provincial government undertook with key developers on the Oak Ridges Moraine and suggests the rationale for and implications of these special negotiations.

During the late 1990s and early 2000s developers had been putting pressure on municipal planning departments on the ORM to approve their plans to build thousands of houses on the moraine; environmentalists, anti-sprawl activists, and homeowner groups opposed these development plans by challenging sprawl and by proposing stringent limits on development to preserve natural areas.⁵¹ While some local municipalities on the ORM, as well as the provincial Government, undertook efforts in the 1990s to protect the ORM,⁵² these efforts were resisted by developers, who claimed that the protection of environmental features on private lands amounted to “expropriation without compensation.”⁵³

⁴⁸ PJ Barnett et al, “On the Origin of the Oak Ridges Moraine” (1998) 35:10 Canadian Journal of Earth Sciences 1152 at 1153.

⁴⁹ *Ibid.*

⁵⁰ Stephen Bocking, “Protecting the Rain Barrel: Discourses and the Roles of Science in a Suburban Environmental Controversy” (2005) 14:5 Environmental Politics 611 at 612.

⁵¹ Anders Sandberg, Gerda Wekerle & Liette Gilbert, *The Oak Ridges Moraine Battles: Development, Sprawl, and Nature Conservation in the Toronto Region* (Toronto: University of Toronto Press, 2013) [Sandberg, Wekerle, & Gilbert].

⁵² The strongest provincial effort to protect the ORM prior to conservation legislation was undertaken by the Liberal and NDP governments. The Liberals declared a “provincial interest” in the ORM in July 1990, and appointed the Oak Ridges Moraine Technical Working Committee to develop interim land use guidelines for development on the moraine, which were never formalized but were nevertheless used by many municipalities. The work was continued by the NDP government (who defeated the Liberals in October 1990) resulting in publication of fifteen reports. The Technical Working Committee was disbanded when the Conservatives came to power in 1995. York Region, Durham Region & Peel Region, *The Oak Ridges Moraine: Towards a Long Term Strategy*, (1999) online: <durham.ca/departments/planed/planning/provincial_links/oakridges/bgpaper091799.pdf> [perma.cc/7TKV-9S4Q].

⁵³ Brian Dexter, “‘A better way of living’: Rural Uxbridge retains its small-town atmosphere,” *Toronto Star* (16 June 2001) N1; Richard Lindgren & Karen Clark, *Property Rights Versus Land Use Regulation: Debunking the Myth of ‘Expropriation without Compensation’* (Toronto: Canadian Environmental Law Association, 1994) at 2 [Lindgren & Clark]; Gail Swainson, “Battle lines drawn over Oak Ridges Moraine. Richmond Hill under fire: Developers slam council for changing its position on land,” *Toronto Star* (12 January 2000) B1.

The Oak Ridges Moraine

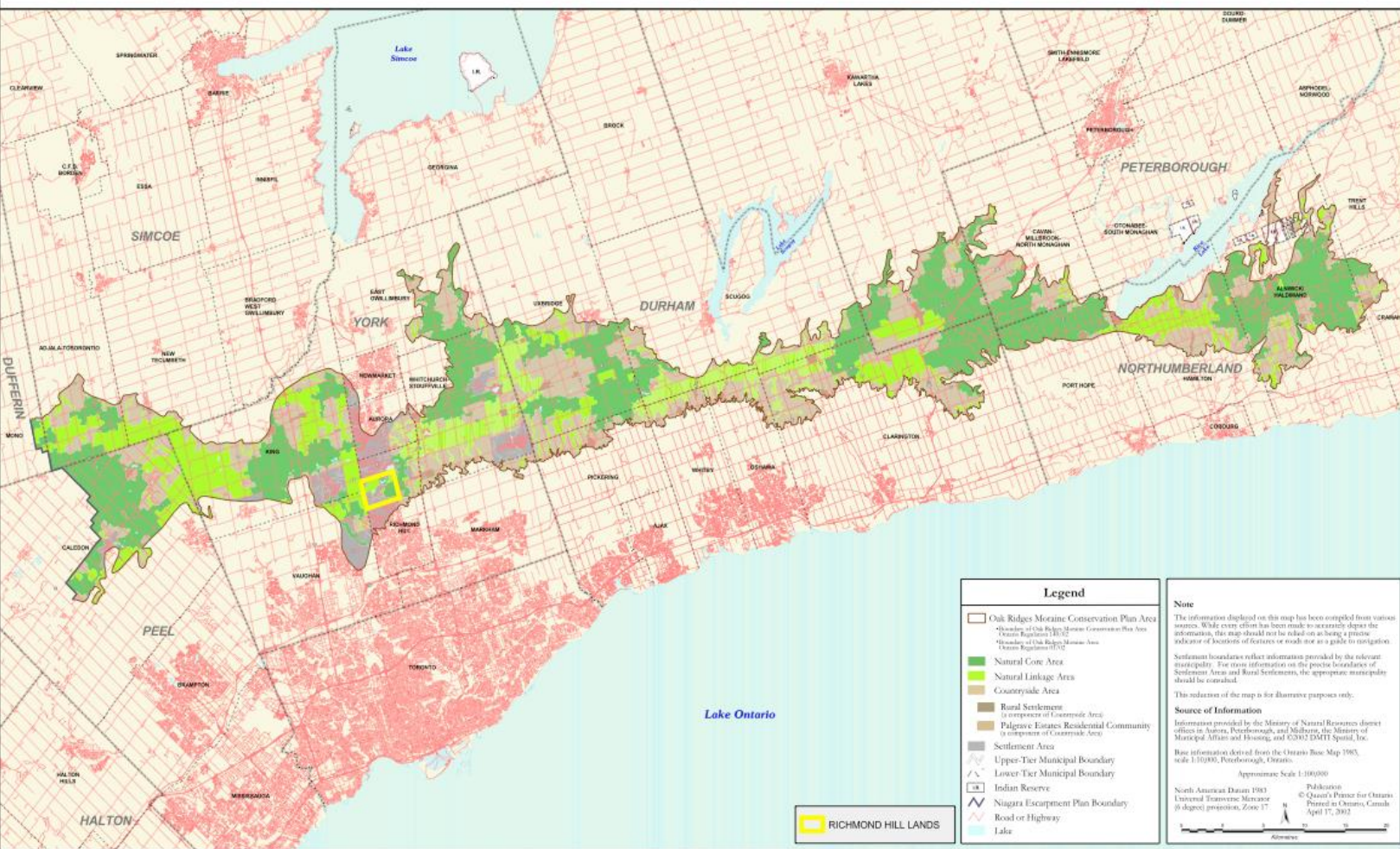


Figure 1. The Oak Ridges Moraine Conservation Plan Area in southern Ontario.⁵⁴

⁵⁴ Ministry of Municipal Affairs and Housing, *The Oak Ridges Moraine* (Toronto: Queen's Printer for Ontario, 2002), online: <mah.gov.on.ca/Page1738.aspx> [perma.cc/RDZ7-DHTEN].

While claims of expropriation without compensation are perhaps to be expected when landowners are faced with government regulations affecting what owners plan to do with their land, these claims often have little legal basis. Private property rights are not protected under the Canadian constitution. Section 92 of the *Constitution Act, 1867* grants provincial legislatures the authority to make laws in relation to property.⁵⁵ The *Canadian Bill of Rights* does indeed protect “enjoyment of property,” but only to the extent that one cannot be deprived of this right except in accordance with “due process of law;” it does not protect abstract property rights in land.⁵⁶ With the legal absence of protection of property rights at the federal level, coupled with numerous statutory and common law limitations on property rights (e.g., environmental and nuisance laws), provincial and federal governments have considerable ability to appropriate so-called “development rights” without having to compensate landowners, as long as legislation serves a justifiable public purpose.⁵⁷ According to Justice Cromwell in *Mariner Real Estate Ltd. v Nova Scotia*, “*de facto* expropriations are very rare in Canada and they require proof of virtual extinction of an identifiable interest in land.”⁵⁸ Cases that have resulted in compensation from statutes affecting zoning are rare in Canada; a key criterion is that the value of land has been nearly diminished entirely.⁵⁹ At no time was this degree of devaluation applicable to proposed regulation of development on the ORM. Yet, as discussed below, developers claims of private property rights often ‘haunted’ the process of imagining and devising conservation legislation on the ORM,⁶⁰ often through threats of lawsuits and claims of unfairness.⁶¹

The contest between developers advocating for their property right and their opponents arguing for environmental protection⁶² reached new heights in the early 2000s, such that the Conservative provincial government, led by Premier Mike Harris, began to develop legislation to limit urban development in parts of the ORM.⁶³ Even though the Harris government was, as Roger Keil describes, “uncompromisingly neoliberal” and ideologically opposed to government

⁵⁵ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, S 92.

⁵⁶ *Canadian Bill of Rights*, SC 1960, c 44, Ss1(a).

⁵⁷ See generally Rogers & Butler, *supra* note 1.

⁵⁸ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*, [1999] 177 DLR (4th) 696 (NS CA) at para 83.

⁵⁹ The few oft-cited successful cases of *de facto* expropriation (*i.e.*, where regulators must compensate owners for regulatory takings) include: *Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101 (SCC); *The Queen in right of British Columbia v Tener et al* (1985), 17 DLR. (4th) 1 (SCC); *Casamiro Resource Corp v British Columbia* (1991), 55 BCLR (2d) 346.

⁶⁰ David Donnelly & Jonathan Tryanski, “Property Rights in Canada: Ontario’s Greenbelt Act” in Allan Greenbaum, Ronald Pushchak & Alex Wellington, eds, *Canadian Issues in Environmental Law and Policy* (Concord, On: Captus Press, 2009) at 341. While Donnelly and Tryanski are mainly referring to the Ontario Greenbelt, they include in their analysis ORM conservation legislation and the claims by developers of lost property rights.

⁶¹ For example, the president of the Greater Toronto Home Builders Association suggested developers were considering legal action in response to a provincial moratorium on development applies to the ORM in May 2001. Gail Swainson & Richard Brennan, “Moraine Moratorium Law Passes: Environmentalists Hail, Developers Hate Six-Month Ban,” *Toronto Star* (18 May 2001) B1.

⁶² The actual “battle lines” around the conflict were much more complex, and also involved planners and politicians of municipalities located on the ORM as well as key decision makers at the Ontario Municipal Board. See, generally Sandberg, Wekerle, & Gilbert, *supra* note 52.

⁶³ *Oak Ridges Moraine Protection Act*, SO 2001, c 3 [*Protection Act*].

“interference” in business,⁶⁴ in order to maintain public support, the Harris government responded to development opposition and passed conservation legislation, the *Oak Ridges Moraine Protection Act*,⁶⁵ on 17 May 2001. This interim legislation prevented developers from submitting new development applications to municipal planning departments on the ORM for a period of six months, after which new legislation and a conservation plan would be put in place. Specifically, the *Oak Ridges Moraine Protection Act* prevented municipalities from enacting new by-laws, approving official plans or official plan amendments, and approving draft or final plans of subdivisions within the Oak Ridges Moraine Plan Area (Figure 1),⁶⁶ and precluded individual applicants from applying for those same things.⁶⁷ The legislation was in effect a significant limitation on private property rights, as existing procedural law outlined in the *Planning Act*⁶⁸ and that dictated the municipal processing of development applications was essentially put on hold. The *Planning Act* specifies procedures and timeframes for proposed zoning changes, plans of subdivision, land severances, and amendments to official plans, and also the procedures and timeframes for appealing municipal decisions to the Ontario Municipal Board. All of these procedures were put on hold through the *Oak Ridges Moraine Protection Act*.

During the six-month period established by the *Oak Ridges Moraine Protection Act*, the Conservative government led public and stakeholder consultations to devise guidelines for the permanent protection of the ORM. It also struck the thirteen member Oak Ridges Moraine Advisory Panel (ORMAP) that included three ORM land developers, as well as representatives from environmental organizations, different levels of government, agriculture and aggregate industries, and academia; the role of the ORMAP was to develop and formulate recommendations for ORM protection that the Minister of Municipal Affairs and Housing, Chris Hodgson, could then use to develop legislation and a Plan for the ORM.⁶⁹ The main recommendation of the ORMAP was to create four land use designations on the ORM that specified permitted land uses, the intent being to protect the most environmentally sensitive areas while still permitting development in existing urbanized areas.⁷⁰

Hodgson attempted to address the interests of developers during the formulation of ORM legislation and Plan. As such, Hodgson made deals with four ORM developers (including the three on the ORMAP) to exchange certain developer-owned land on the ORM with provincially-owned lands in an adjacent municipality, Pickering, Ontario (Figure 2).⁷¹ This land exchange became known as the “Seaton Land Exchange” because the land the developers received in

⁶⁴ Roger Keil, “‘Common-sense’ Neoliberalism: Progressive Conservative Urbanism in Toronto, Canada” (2002) 34:3 *Antipode* 578 at 588 [Keil].

⁶⁵ *Protection Act*, *supra* note 63.

⁶⁶ *Protection Act*, *supra* note 63 at s 2(1).

⁶⁷ *Protection Act*, *supra* note 63 at s 3(1).

⁶⁸ *Planning Act*, RSO 1990, c P13 [*Planning Act*].

⁶⁹ Ministry of Municipal Affairs and Housing, *Share Your Vision for the Oak Ridges Moraine* (Toronto: Queen’s Printer for Ontario, 2002) [MMAH, *Share Your Vision*].

⁷⁰ The four categories include: “natural core areas,” which contain the most environmentally sensitive areas; “natural linkage areas,” which link natural core areas; “countryside areas,” which include agricultural land; and “settlement areas,” which include lands already approved for urban land use; *ibid*.

⁷¹ Ministry of Municipal Affairs and Housing, *Principles: North Pickering Land Exchange and Development* (Toronto: Queen’s Printer for Ontario, 2002) [MMAH, *Land Exchange*].

Pickering had long been planned for development of a city called Seaton.⁷² As is further elaborated below, as part of the deal, Hodgson also used a minister's zoning order⁷³ to permit the developers to build 6,600 housing units on approximately 375 hectares of land within the ORM, which would become the subdivisions “Macleod’s Landing” and “Bond Lake Village” in Richmond Hill, a town on the ORM north of Toronto.⁷⁴ This, as well as the land exchange, allowed Hodgson to garner developer support for protection of the rest of the ORM.

A land exchange had long been suggested by the environmental group, Save the Oak Ridges Moraine (STORM), as one way to remove development interests from the moraine.⁷⁵ Of the four developers involved in the Seaton land exchange, three owned land in Richmond Hill and one owned land in Uxbridge, a township north of Pickering, and all had active development applications that were put on hold by the *Oak Ridges Moraine Protection Act*. The Richmond Hill development applications were very contentious, triggered massive citizen mobilization contesting the proposals, and resulted in failure on the part of Richmond Hill city council to

⁷² Plans for Seaton began in 1972 in conjunction with plans for an international airport in North Pickering and surrounding areas; John Van Nostrand, *Seaton: The form of its history. A socio-economic history of the Seaton lands within the North Pickering Planning Area* (Toronto: Ontario Ministry of Housing, 1990).

⁷³ A zoning order gives the Minister of Municipal Affairs and Housing, authorized through the Planning Act, the ability to rezone any land in Ontario for various reasons, including to protect a “provincial interest”. Ministry of Municipal Affairs and Housing, *Citizen’s Guide: Zoning By-Laws* (Toronto: Ministry of Municipal Affairs and Housing, Provincial Planning Policy Branch, 2010) at 7 [MMAH, *Citizen’s Guide*].

⁷⁴ Carolyn Mallan, “Moraine land deal a boost for green space: Province agrees to swap plan ends years of heated debate,” *Toronto Star* (24 September 2004); Ian Urquhart, Richard Brennan & Gail Swainson, “Land swap saves moraine: Development frozen as Tories offer Seaton property to builders,” *Toronto Star* (1 November 2001) A1.

⁷⁵ Brian McAndrew, “Showdown at the Oak Ridges Moraine: Scenic green space or urban sprawl? The battle lines have been drawn,” *Toronto Star* (12 February 2000) H1, H8.

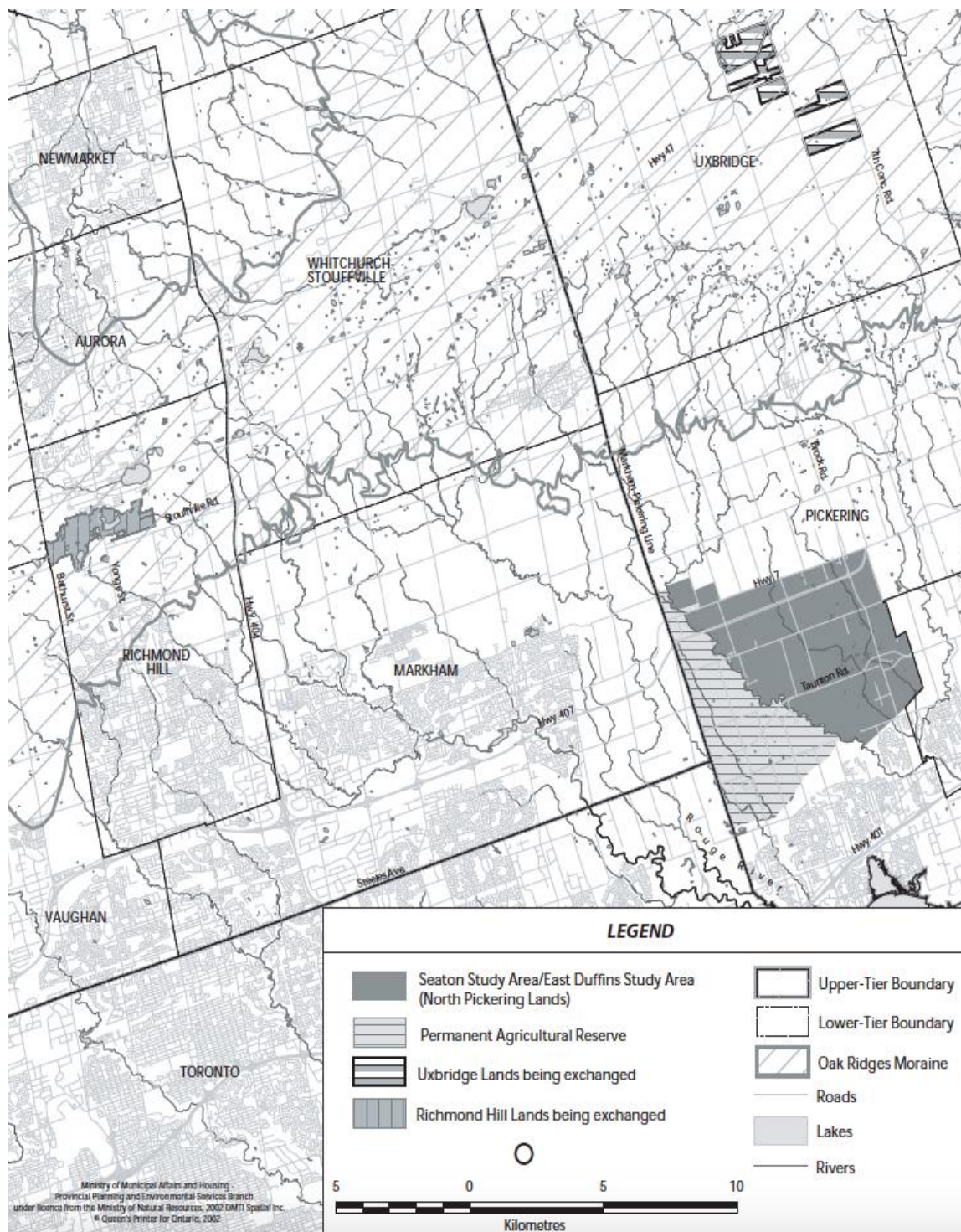


Figure 2. Seaton land exchange. Land developers exchanged Richmond Hill and Uxbridge lands for provincially owned land in Seaton, Pickering.⁷⁶

⁷⁶ Figure adapted from MMAH, *Land Exchange*, *supra* note 71 at Appendix A(9).

make a decision on the applications.⁷⁷ As a result, these developers were part of group of Richmond Hill landowners that had appealed their development applications to the Ontario Municipal Board (OMB), the quasi-judicial appeals tribunal charged with resolving land use planning disputes in Ontario.⁷⁸ The OMB had not yet made a decision when the *Oak Ridges Moraine Protection Act* was passed in May 2001.

After the six-month period following passage of the *Oak Ridges Moraine Protection Act*, the *Oak Ridges Moraine Conservation Act, 2001*,⁷⁹ was passed in the provincial legislature, which put significant limits on land development on the ORM and which gave the Minister of Municipal Affairs and Housing the authority to establish the Oak Ridges Moraine Conservation Plan.⁸⁰ The *Oak Ridges Moraine Conservation Act* included “transitional provisions” that were applicable to “all applications, matters or proceedings commenced on or after November 17, 2001”⁸¹ (given the six-month moratorium on development authorized by *Oak Ridges Moraine Protection Act*, the applicable date was actually 17 May 2001). The transitional clause stated that any planning decisions made by planning authorities prior to 17 November 2001 (actually 17 May 2001) were permitted to proceed; applications where decisions had not been rendered, including by the OMB, were required to “conform to the prescribed provisions of the Oak Ridges Moraine Conservation Plan as if the Plan were in force on or before the date the application, matter or proceeding was commenced.”⁸² The applications made by the developers involved in the Seaton land exchange had yet to be approved, and without a special deal would have been subject to the new provisions. As Rodgers notes, new legislation has the potential to shift the prevailing property rights of owners,⁸³ in this case by eliminating the right of landowners to apply to have the zoning of their land changed from rural to urban. This is one way that private property rights can be construed as political—subject to land use conflict and a state legislative response, such as new environmental regulations.⁸⁴ While conservation legislation did not alter the ownership of land for ORM landowners in terms of title, it shifted the suite of property rights that they previously enjoyed, including the right to develop their land if granted permission to do so by local municipal planning authorities. For the land exchange developers, however, property rights took on a very different form, as is explained below.

In contrast to limiting the use of private property through new provincial legislation that defined how land would be zoned, the Seaton land exchange was in effect an expropriation with compensation, where developers were compensated for loss of their so-called “development

⁷⁷ *Planning Act*, *supra* note 68.

⁷⁸ Ontario Municipal Board, Decision /Order No. 0809, 25 May 2001.

⁷⁹ *Conservation Act*, *supra* note 2.

⁸⁰ The *Oak Ridges Moraine Conservation Act, 2001*, which was passed in the Ontario Legislature on 13 December 2001, was part of a comprehensive provincial strategy for the ORM that also included a draft Oak Ridges Moraine Conservation Plan, the objectives of which were established by the *Oak Ridges Moraine Conservation Act, 2001*. Ministry of Municipal Affairs and Housing, *Oak Ridges Moraine Conservation Plan* (Toronto: Ministry of Municipal Affairs and Housing, 2002) [MMAH, *Conservation Plan*]. The Oak Ridges Moraine Conservation Plan was established by Ontario Regulation 140/02, which came into effect 22 April 2002.

⁸¹ *Conservation Act*, *supra* note 2 at 15(2).

⁸² *Ibid.*

⁸³ Rodgers, *supra* note 44 at 557.

⁸⁴ Rodgers, *supra* note 44 at 553.

rights” on ORM lands by the granting of lands of similar value off the ORM.⁸⁵ While a clear rationale for the land exchange has never been offered by the province, it likely has to do with the exceptional nature of both the land itself and of the political context. The Richmond Hill lands in particular were deemed by environmental activists and provincial government agencies, drawing on conservation biology principles, to be of ecological significant and in need of protection.⁸⁶ Furthermore, as an example of what Sandberg and Wekerle refer to as “rural gentrification,” wealthy exurban homeowners’ groups opposed development in Richmond Hill, as they feared development would jeopardize the amenity value of an exclusive and scenic landscape.⁸⁷ The ORM land use conflicts seemed to take on what Frederic Deng describes as a prototypical controversy in land use change that creates a dilemma for land use regulators: “the problems of NIMBY (not in my back yard) and ‘regulatory takings’.”⁸⁸ In other words, opponents to development demand increased land use regulation to protect a valuable resource, while proponents argue that increased land use regulation is an affront to private property rights. These development proposals became very politicized, and were likely the catalyst for provincial government action to protect the ORM. The result is that four developers were able to escape the full impact of the legislation that changed the private property rights of all other ORM landowners. Through the land exchange, these developers were also able to have their property rights shifted from one site, the ORM in Richmond Hill, to another, Seaton in Pickering. While a contested idea (e.g., see Sarah Hamill, this volume⁸⁹), to some property and socio-legal theorists, property is not a thing, but a social relationship with respect to things.⁹⁰ In this case, the relationship between developers and the state proved to be crucial. The “thing” was not really even land, at least particular parcels of land. It was the right, given by a planning authority, to profit from the transformation of a land from one land use category (rural) to another (urban).⁹¹ It was the ability to escape a provincial level policy limiting the use of land. No other ORM landowners were provided a way to escape this legislation that significantly impacted the use of private property.

As mentioned above, some of the Seaton land exchange developers profited from exceptions to the ORM legislation in another way: through a zoning order Minister Hodgson used in 2001 granting developers permission to build 6,600 housing units on the ORM in

⁸⁵ The land exchange was an expropriation in that the provincial government took ownership of land rather than simply regulate its use.

⁸⁶ Graham Whitelaw & Paul Eagles, “Planning for Long, Wide Conservation Corridors on Private Lands in the Oak Ridges Moraine, Ontario, Canada” (2007) 21:3 *Conserv Biol* 675 at 680.

⁸⁷ Anders Sandberg & Gerda Wekerle, “Reaping Nature’s Dividends: The Neoliberalization and Gentrification of Nature on the Oak Ridges Moraine” (2010) 12:1 *J Environ Policy Plann* 41 at 46.

⁸⁸ Frederic F Deng, “The Rebound of Private Zoning: Property Rights and Local Governance in Urban Land Use” (2003) 35:1 *Environment and Planning A* 133 at 133.

⁸⁹ Sarah Hamill, “Community, Property, and Human Rights: The Failure of Property-as-Respect,” this volume.

⁹⁰ Brigham, *supra* note 40 at 3; Gray & Gray, *Idea of Property*, *supra* note 29 at 15; Crawford Macpherson, “The Meaning of Property” in Crawford MacPherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto, 1978); Joseph Singer, *Property Law: Rules, Policies, and Practices* (Boston: Little Brown, 1993); Arnold Weinrib, “Information and Property” (1988) 38:2 *UTLJ* 117.

⁹¹ Simon Chamberlain calls these development permissions the “fifth factor of production” (the others being land, labor, capital, and skill) because they are elements of the production process that increase the value of the initial input, land. Simon B Chamberlain, “Aspects of Developer Behaviour in the Land Development Process,” Research Paper No 56, (Toronto: Centre for Urban and Community Studies, University of Toronto, 1972) at 4.

Richmond Hill.⁹² Section 47 of the *Planning Act, 1990* gives the Minister of Municipal Affairs and Housing the authority to rezone, without public notice or hearing, any property in Ontario.⁹³ Zoning orders are rarely used in jurisdictions with existing planning authorities and zoning by-laws.⁹⁴ Yet zoning orders represent a latent form of authority that can be used at the discretion of the ruling government, even in jurisdictions with existing planning authority and official plans. The minister's zoning order is a powerful tool that although rare, renders legal zoning categories subject to change at the determination of the provincial government. They are usually justified with reference to public or provincial "interests," but as Carol Rose notes, terms such as "interest" have multiple meanings.⁹⁵ In the case of the ORM, the Harris government had many interests, including popular support and conflict resolution. A minister's zoning order is therefore a tangible way that various political interests can be transformed into specific rules affecting property rights.

When the Harris government⁹⁶ granted some ORM developers permission to build 6,600 housing units on the ORM through a zoning order and minutes of settlement, the opposition Liberal party strongly opposed this deal. In late 2003 the Liberal government, under the leadership of Dalton McGuinty, won the provincial election, promising, as part of the election campaign, to cancel the deal and halt all new housing construction on the ORM. Once elected, however, McGuinty backtracked on this promise, citing legal agreements that had been made between the Conservatives and the developers prior to the election. In the fall of 2003, McGuinty fulfilled election promises to begin developing a massive greenbelt of protected agricultural and environmental lands (Figure 3). Greenbelt legislation was enacted 24 February 2005 through the *Greenbelt Act, 2005*.⁹⁷ The *Greenbelt Act* authorized the Greenbelt Plan, which specified land uses for the greenbelt.⁹⁸ The Greenbelt Plan incorporates the existing regional plans, the Niagara Escarpment Plan, and the Oak Ridges Moraine Plan, and includes a new category called the "Protected Countryside."⁹⁹ The Protected Countryside includes three main categories of land use with differing policies: the Agricultural System, the Natural System, and Settlement Areas.¹⁰⁰ Only in settlement areas, which are defined by existing municipal boundaries of towns, villages, and hamlets, is urban development permitted (within the guidelines of existing municipal official plans).¹⁰¹

⁹² Developers were permitted to develop approximately 375 hectares of land, part of which would become the subdivision "Macleod's Landing," on the ORM near Yonge Street in Richmond Hill; Sandberg, Wekerle, & Gilbert, *supra* note 52 at 257.

⁹³ *Planning Act*, *supra* note 68.

⁹⁴ MMAH, *Citizen's Guide*, *supra* note 73.

⁹⁵ Rose, "Property and Expropriation," *supra* note 45 at 1.

⁹⁶ While in this article I mainly associate the Oak Ridges Moraine conflict and legislation with the Conservative provincial government led by Mike Harris, Harris resigned and was succeeded by Ernie Eves in May 2002.

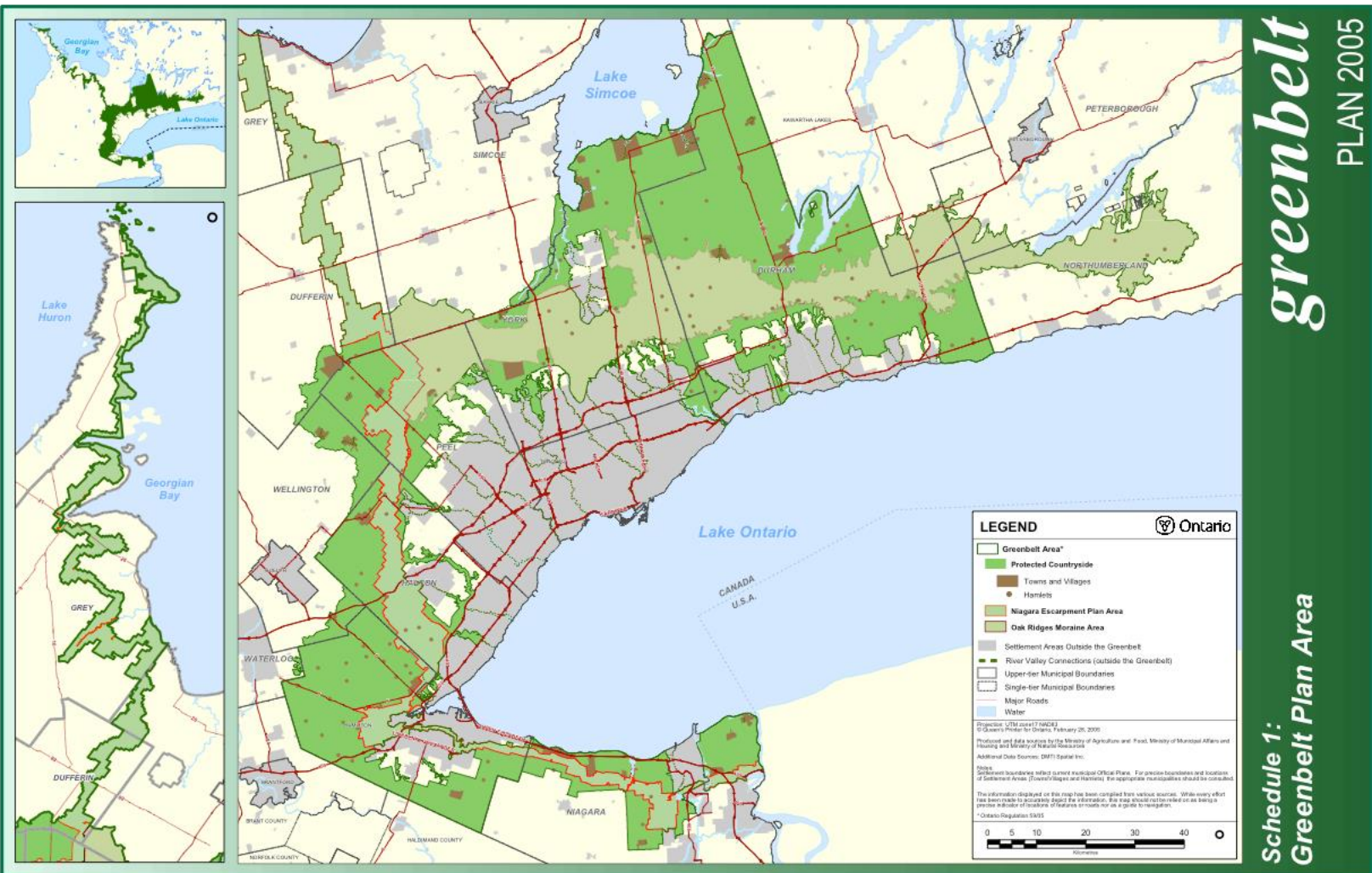
⁹⁷ *Greenbelt Act*, *supra* note 3.

⁹⁸ The Greenbelt Plan specified different categories of land and their associated zoning. The "Protected Countryside" is most restrictive in terms of housing development, whereas "Settlement Areas" largely leave land use controls up to the local municipalities. Expansions to settlement areas, however, are subject to strict provincial controls, Ministry of Municipal Affairs and Housing, *Greenbelt Plan, 2005* (Toronto: Ministry of Municipal Affairs and Housing, 2005) [*Greenbelt Plan*].

⁹⁹ *Ibid* at 3.

¹⁰⁰ *Ibid* at 12.

¹⁰¹ *Ibid* at 24.



¹⁰² Ministry of Municipal Affairs and Housing, *Greenbelt Plan Appendix II: Schematic Showing Settlements Within Greenbelt Area* (Toronto: Queen's Printer for Ontario, 2005), online: <ma.h.gov.on.ca/AssetFactory.aspx?did=12340> [perma.cc/9L9Y-C8NW].

Stakeholder and public consultation processes used to formulate greenbelt legislation in some ways mirrored the ORM process. In February 2004, the Minister of Municipal Affairs and Housing, John Gerretsen, appointed a stakeholder advisory body, the “Greenbelt Task Force” to develop principles and lead public and stakeholder consultations.¹⁰³ The composition of the Task Force included representatives of municipal and regional municipalities, five industry representatives, including two developers and one from the aggregate industry, and five NGOs, of which four represented environmental organizations. Public meetings were held across the greenbelt planning area and in August 2004 the Greenbelt Task Force produced a recommendations report¹⁰⁴ from which provincial inter-ministerial teams then developed a draft greenbelt plan,¹⁰⁵ which was approved in February 2005.¹⁰⁶ Similar to the ORM conservation legislation, Section 24 of the *Greenbelt Act* specifies “transitional” clauses specifying the start date of greenbelt legislation as 16 December 2004; development applications approved prior to that date, including approved transitional applications on the ORM, would be permitted to proceed.¹⁰⁷

But the greenbelt legislation also differs in important ways from the ORM legislation. For one, ORM legislation was fueled by resistance, over a long period of time (at least a decade), from homeowner groups, environmental groups, and diverse other actors.¹⁰⁸ Legislation was to a large extent the coming together of long-standing land use conflict and a specific moment of electoral politics, where the Conservative government felt compelled to resolve this land dispute in order to maintain the support of its broad constituency.¹⁰⁹ The Conservatives, under Mike Harris, took action on the ORM not necessarily because they prioritized environmental protection, but rather because they were under political pressure to do so by their constituency, which included many homeowner activists on the moraine, especially wealthy owners of large estate lots.¹¹⁰ Ideologically, the Harris government was opposed to government “interference” in business, including the land development business.¹¹¹ Roger Keil argues that Harris’s land use policies both retreated from environmental regulations enacted by previous governments, and reworked environmental regulations to favour privileged groups, such as home owners and land developers.¹¹² The action the Harris government took in 2001 to protect the ORM must be understood within a specific neoliberal institutional setting. It took action to protect the

¹⁰³ Ministry of Municipal Affairs and Housing, *Toward a Golden Horseshoe Greenbelt. Greenbelt Task Force Discussion Paper: A Framework for Consultation, May 2004* (Toronto: Queen's Printer for Ontario, 2004) at 3, 5.

¹⁰⁴ Ministry of Municipal Affairs and Housing, *Toward a Golden Horseshoe Greenbelt. Greenbelt Task Force Discussion Paper: Advice and Recommendations to the Minister of Municipal Affairs and Housing, August 2004* (Toronto: Queen's Printer for Ontario, 2004).

¹⁰⁵ Ministry of Municipal Affairs and Housing, *Draft Greenbelt Plan, October 2004* (Toronto: Queen's Printer for Ontario, 2004).

¹⁰⁶ *Greenbelt Plan*, *supra* note 98.

¹⁰⁷ *Greenbelt Act*, *supra* note 3.

¹⁰⁸ Sandberg, Wekerle, & Gilbert, *supra* note 52.

¹⁰⁹ Gabriel Eidelman, “Managing Urban Sprawl in Ontario: Good Policy or Good Politics?” (2010) 38:6 *Politics and Policy* 1211 [Eidelman].

¹¹⁰ Richard White, *The Growth Plan for the Greater Golden Horseshoe in Historical Perspective* (Toronto: Neptis Foundation, 2007) at 40 [White]; Sandberg, Wekerle, & Gilbert, *supra* note 52.

¹¹¹ Keil, *supra* note 64 at 588.

¹¹² *Ibid.*

environment in order to protect its conservative electoral base, which was calling for protection of the moraine. But it certainly was not going to abandon its corporate allies—land developers—and ensured that some of them were ultimately protected (and compensated through the land exchange) for loss of what developers perceived as their development rights. The process of developing legislation was characterized by negotiation and compromise, where the provincial government sought to appease the interests of environmental groups, homeowners, and developers by inviting them to work together on the ORM advisory panel.

On the other hand, the McGuinty Liberal government seemed to have little incentive to appease developers during enactment of greenbelt legislation, even though many developers supported the Liberal party through campaign contributions and other forms of fundraising. David Pond suggests that provincial governments in Canada are particularly inclined towards land use based activism, given their responsibility for land use regulation.¹¹³ According to Pond, although this activism is common across all political parties, the form it takes can vary extensively. Activism also has both historical and future-oriented dimensions. As third-phase institutionalists note, political actors must confront existing rules and norms, and evaluate to what extent they can navigate these legacies as they try to assert their own agendas.¹¹⁴ The McGuinty government, at least in its first mandate, positioned itself in direct opposition to the Conservatives. Primarily under Mike Harris, the Conservative government, from 1995 to 2003, carried out its “Common Sense Revolution”¹¹⁵ that, among other things, reduced funding to environmental programs and agencies;¹¹⁶ restructured the land use planning system in Ontario by reforming the OMB in favour of developers;¹¹⁷ and “streamlined” the development process by reducing “delays” and the scope of development applications.¹¹⁸ While the McGuinty

¹¹³ Pond, “Greenbelt Politics,” *supra* note 1 at 244.

¹¹⁴ Olsson, *supra* note 6 at 26.

¹¹⁵ The Common Sense Revolution had four main goals: reducing taxes; reducing and improving efficiency of government spending; reducing so-called red tape that was said to be hampering growth; and balancing the budget. Progressive Conservative Party of Ontario, *The Common Sense Revolution* (Toronto: Progressive Conservative Party, 1994).

¹¹⁶ These include budget reductions to what was then the Ministry of Environment and Energy, the Ministry of Natural Resources, and Conservation Authorities; reductions in scope of the *Environmental Protection Act*, *Ontario Water Resources Act*, and *Conservation Authorities Act*; and repeal of many of the former NDP government’s land use planning reforms that it had carried out through the Commission on Planning and Development Reform; Mark Winfield & Greg Jenish, *Ontario’s Environment and the ‘Common Sense Revolution’* (Toronto: Canadian Institute for Environmental Law and Policy, 1996).

¹¹⁷ As David Pond outlines in his analysis of Planning Act reforms in the 1990s, the NDP government made changes to the Ontario Municipal Board (OMB) in 1994 that compelled board decisions to “be consistent with” provincial policy, replacing what had been “have regard to” provincial policy. After winning the provincial election in 1995, the Harris government reverted to the “have regard to” clause. The Harris government also reduced the time municipalities (planners and/or council) had to make decisions on development applications and zoning decisions before developers could appeal to the OMB; the Harris government also reduced what were considered to be “complete” applications, meaning that municipal planning staff were often lacking information required for them to make an informed decision on a planning application, resulting in delays and more appeals by developers to the OMB; David Pond, “Rewriting the Rules of the Game: The Common Sense Revolution and Administrative Justice” (Paper presented at the Annual Canadian Political Science Association Conference, 3 June 2004) [Pond, “Rules of the Game”]

¹¹⁸ “Streamlining” of the development process was carried out mainly through the *Land Use Planning and Protection Act*, SO 1996, c 4, which gave municipalities more control over planning decisions; reduced the power of the province at the OMB by only permitting one ministry, the Ministry of Municipal Affairs and Housing, to appeal

government inherited this “streamlined” land use planning regime, it signalled its own agenda early in its campaign by announcing that it would not only halt further development on the ORM, but would also create a massive regional greenbelt in order to stop sprawl and preserve agricultural land in the Toronto region.¹¹⁹ The McGuinty government embraced growth management and a highly interventionist environmental agenda of land use regulation, an agenda that angered many landowners.¹²⁰ This signaled a change in institutional culture where developers were no longer as privileged a social group as they had been under the Harris government.

The McGuinty government did encounter resistance from one development group¹²¹ during enactment of greenbelt legislation, which provides an illustrative comparison to the Seaton land exchange by the Harris government. This development group, led by notable Toronto region developer Silvio DeGasperis, owned land in part of an agricultural preserve called the Duffins Rouge Agricultural Preserve (DRAP), an approximately 1900 hectare triangle of land located just west of the Seaton lands in Pickering (see Figure 4; note the DRAP is referred to on the map as Agricultural Assembly). DeGasperis and other landowners on the DRAP (collectively known as the West Duffins Landowner Group) had been working with the City of Pickering to carry out a Growth Management Study (GMS) beginning in 2002; the study recommended development of approximately 400 hectares of the DRAP lands, near the village of Cherrywood (Figure 4, Figure 5), that were owned by DeGasperis.¹²² The GMS also designated much of the Seaton lands as “natural heritage system” (Figure 5), even though by 2001 the province has signaled its intentions to exchange the Seaton lands and approve them for urban development.

While the City of Pickering ultimately acknowledged the provincial plan to develop Seaton and preserve the DRAP as agricultural land and part of the Greenbelt, the West Duffins Landowner Group insisted that the Cherrywood Lands be removed from the Greenbelt. DeGasperis' firm, Duffins Capital Corp, a member of the West Duffins Landowner Group, made a presentation 1 February 2005 to standing committee at the provincial legislature debating the

planning decisions to the OMB; and reduced the time permitted by planning authorities to make decisions on development or rezoning proposals. The Harris government also formulated a new Provincial Policy Statement that reduced municipal requirements for affordable housing, schools, parks, and hospitals when planning new developments, and also allowed for less stringent regulations on building near sensitive environmental features; Pond, “Rules of the Game,” *supra* note 117 at 21.

¹¹⁹ John Barber, “Liberal promise could lift cloud over moraine,” *The Globe and Mail* (26 November 2002) A21, online

<theglobeandmail.com/news/national/liberal-promise-could-lift-cloud-over-moraine/article758173/>

[perma.cc/QR9E-MP8Z].

¹²⁰ For example, the president of the Greater Toronto Home Builders' Association penned an article in the *Toronto Star* criticizing many of the new McGuinty governments decisions, including OMB reform and the greenbelt; Joe Valela, “Proposed planning reforms will hurt affordability,” *Toronto Star* (29 November 2003) M4.

¹²¹ This group, or parts of this group, have been referred to by different names: the West Duffins Landowners Group, Duffin Capital Corp., Hollinger Farms No 1 Inc., and Altona Farms Inc.; the main developer involved in these groups is Silvio DeGasperis, a principal of TACC Construction.

¹²² Dillon Consulting Limited, *City of Pickering growth management study: Phase 2, preferred growth management concept and structure* (Toronto: Dillon Consulting Limited, 2004).

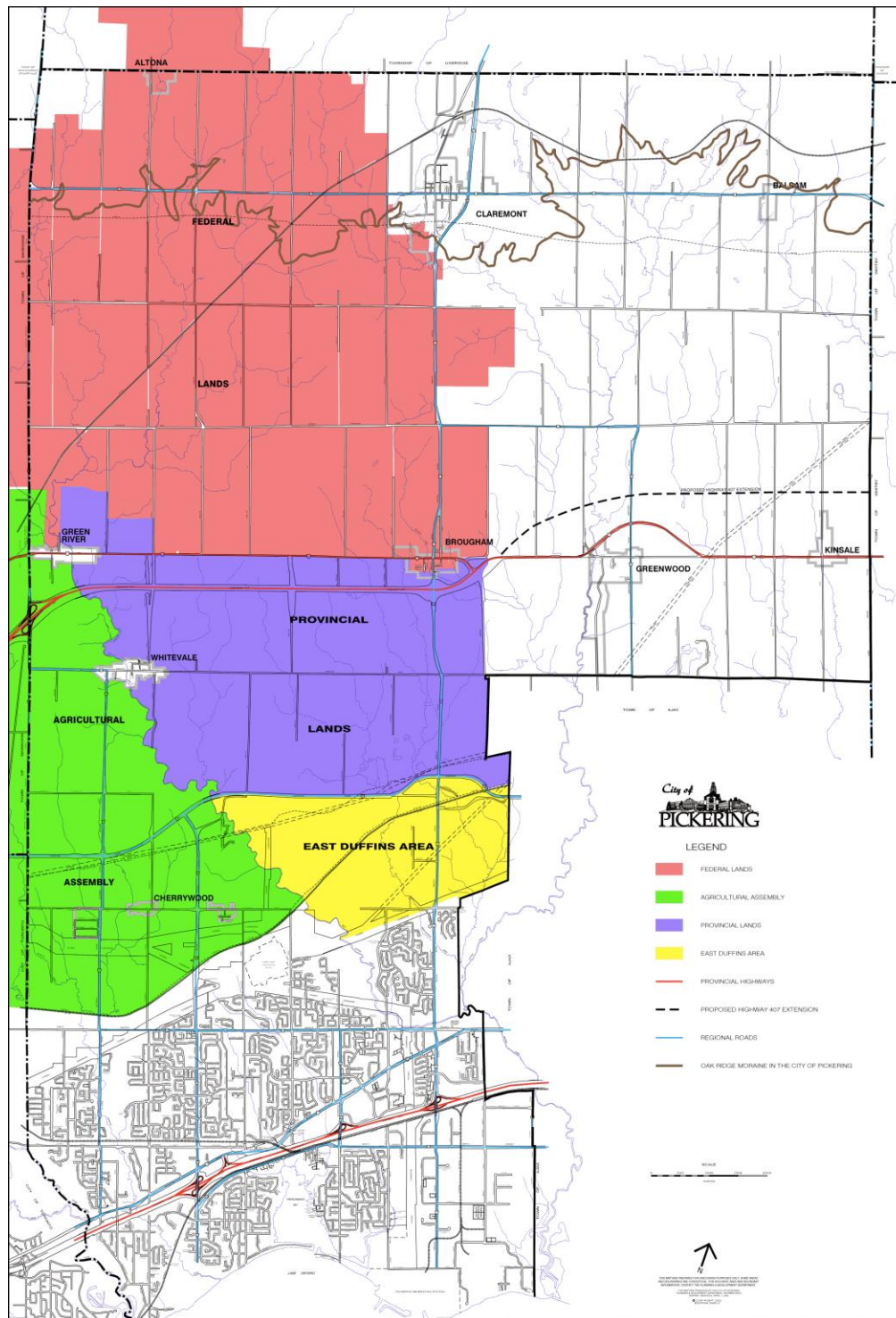


Figure 4. Study area of the City of Pickering Growth Management Study.¹²³

¹²³ Map adapted from City of Pickering, Growth Management Study Area Boundary as Per Council Resolution #29/02 (Pickering: City of Pickering Planning and Development Department, 2002).

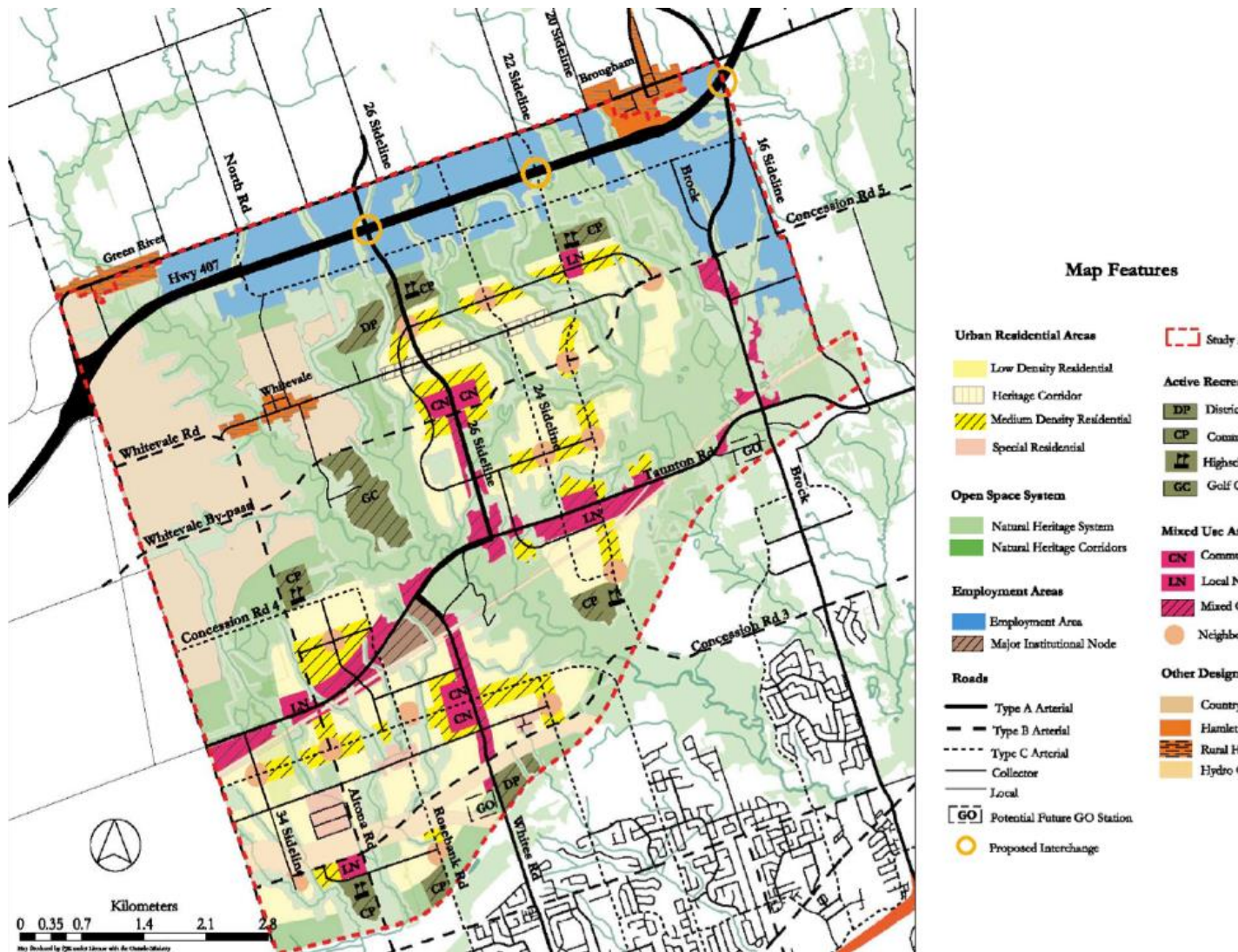


Figure 5. Recommended plan of the City of Pickering Growth Management Study.¹²⁴

¹²⁴ Map adapted from Ministry of Municipal Affairs and Housing, *Central Pickering Development Plan* (Toronto: Queen's Printer for Ontario, 2006) at 15.

Greenbelt Act.¹²⁵ Its argument was that development on the DRAP, instead of Seaton, would better protect the environment and the cultural heritage of Pickering; that agricultural opportunities were greater in Seaton than in the DRAP; that the DRAP lands were more readily serviced (water, sewer, electricity, roads) since they were closer to the existing urban area; and that the agricultural capabilities of parts of the DRAP were quite limited. When this argument failed to convince the McGuinty government, DeGasperis, through the companies Hollinger Farms No. 1 Inc. and Altona Farms Inc., filed a lawsuit against the provincial government, specifically the Minister of Environment and the Ontario Realty Corporation, claiming that the government did not carry out a proper environmental assessment for the Seaton lands.¹²⁶ The court dismissed the case, stating that the landowner group filed the lawsuit in order to “frustrate, disrupt and delay the [Seaton] land exchange as a further step in their ongoing war with the Province in their attempts to harass and intimidate the Province into permitting development on their lands adjoining the Seaton Lands.”¹²⁷ This war was described in a *Toronto Star* article explaining how DeGasperis was resisting McGuinty's greenbelt; “Pushing back is a polite way of characterizing the war he's been waging against the province since the fall of 2004, when Dalton McGuinty's Liberals slapped the greenbelt on 400 hectares of Pickering farmland DeGasperis wants to turn into more subdivisions.”¹²⁸ But McGuinty paid little attention to DeGasperis or the many other landowners who perceived that their property rights had diminished with greenbelt legislation. In one notable letter to the editor in the *Toronto Star*, a landowner states his frustration with the McGuinty government, suggesting that even the very wealthy were not able to defend their property rights:

The end of the rights of the private-property owner is in sight when a developer with deep pockets cannot assert his property rights by spending \$5 million. What is a mere mortal to do? The province's greenbelt legislation, which took away Silvio DeGasperis's [principle of Hollinger Farms] rights on his property, mine and thousands of other homeowners right across the province, amounts to expropriation without compensation. ... Every time I see those green signs on the highway, 'Entering Ontario's Greenbelt,' I feel sick. Where did they get the greenbelt? They stole it from private landowners.¹²⁹

Despite these claims, the McGuinty government proceeded with greenbelt legislation, and provided no compensation to appease landowners,¹³⁰ although some developments, such as

¹²⁵ Legislative Assembly of Ontario, “Standing committee on general government: Greenbelt Act, 2005, Bill 135, Tuesday 1 February, 2005,” (2005), online:< ontla.on.ca/committee-proceedings/transcripts/files_pdf/2005-02-01_pdfG027.pdf> [perma.cc/2LNX-H7D2].

¹²⁶ *Hollinger Farms No. 1 Inc. v Ontario (Minister of Environment)*, 2007 ON SCDC 229 [Hollinger].

¹²⁷ *Ibid* at 9; the connection between Silvio DeGasperis and the Seaton land exchange is indirect but important. DeGasperis opposed development of Seaton (and thus the land exchange that fast-tracked its development) because principle 6 of the ‘North Pickering Land Exchange Review Panel’ stated that Seaton should be developed in conjunction with preservation of the Duffins-Rouge Agricultural Preserve, the location of DeGasperis's Cherrywood lands; MMAH, *Land Exchange*, *supra* note 71 at 2.

¹²⁸ Laurie Monsebraaten, “If you push me around, I'll push back,” *Toronto Star* (28 September 2006) R1.

¹²⁹ Phil Mahon, “A win for the environment?,” *Toronto Star* (18 June 2007) AA7.

¹³⁰ Marco Amati & Laura Taylor. “From Green Belts to Green Infrastructure” (2010) 25:2 Planning Practice and Research 143 at 146.

quarries, highways, and infrastructure were permitted to continue,¹³¹ and the Greenbelt Plan includes mechanisms through which municipal councils of towns, villages, and hamlets can apply for “modest” urban boundary extensions.¹³² Similar to the ORM disputes,¹³³ many landowners claimed to have suffered “expropriation without compensation” (or *de facto* expropriation), even though not land was expropriated, and for the most part, land was not down-zoned, but rather existing zoning was frozen to conform to new land use categories, such as settlement, agricultural, and natural areas.¹³⁴ When Hollinger Farms filed a lawsuit against the McGuinty government, McGuinty did not back down or resort to compromise the way the Harris government had done during the Seaton land exchange process. Hollinger Farms ended up losing in court, and the McGuinty government, as do all provincial governments in Canada,¹³⁵ was able to assert its authority to regulate land use. The McGuinty government used its authority to freeze the zoning of land without requiring compensation, since the existing use of land was not changed, and in so doing treated all landowners in a similar manner. The Harris government preferred instead to grant four large developers rights through a land exchange, and to formulate complex transitional clauses to permit select developers to develop land in a manner that was not available to other landholders.

III. CONCLUSION: PROPERTY AND POLITICS IN THE TORONTO REGION

Through a comparison of ORM Conservation legislation (enacted by the Conservatives under Mike Harris) and Greenbelt legislation (enacted by the Liberals under Dalton McGuinty) this article has illustrated that land use legislation affecting private property rights can serve political agendas and navigate practical solutions to land use conflicts. While both the ORM and Greenbelt legislation involved regional planning at the provincial level and significant loss of developers’ ability to apply to develop their land, the processes leading to these statutes were very different. ORM Conservation legislation was the result of years of opposition by many actors and interests to land development on the ORM. It also involved extensive stakeholder and public consultation in order to resolve long-standing conflict between developers, homeowner groups, environmental activists, and municipal government representatives. Some developers were able to negotiate a settlement that allowed them to continue to develop their ORM lands, and they were also the beneficiaries of a land exchange that provided them with developable land off the ORM. This article has shown that the process of developing the greenbelt, on the other

¹³¹ Felix Fung & Tenley Conway, “Greenbelts as an Environmental Planning Tool: A Case Study of Southern Ontario, Canada” (2007) 9:2 *Journal of Environmental Policy & Planning* 101; Gerda Wekerle et al, “Nature as a Cornerstone of Growth: Regional and Ecosystems Planning in the Greater Golden Horseshoe” (2007) 16:1 *Canadian Journal of Urban Research* 20.

¹³² According to the Greenbelt Plan, some urban boundary extensions are permitted, including “modest growth that is compatible with the long-term role of these settlements as part of the Protected Countryside and the capacity to provide locally based sewage and water services;” *Greenbelt Plan*, *supra* note 98 at 24. The Greenbelt Plan also must be reviewed every ten years, at which time “modest settlement area expansions may be possible for Towns/Villages;” *ibid* at 25.

¹³³ See, for example, Lindgren & Clark, *supra* note 54 at 2.

¹³⁴ *Greenbelt Plan*, *supra* note 98 at 3.

¹³⁵ *Hollinger*, *supra* note 126.

hand, was relatively quick, involved little negotiation with landowners and included no compensatory measures.

The political conditions under which these two statutes were enacted were influential to the ultimate form these statutes took, but not explained by existing urban and planning theories of land use development. This joining up of politics and property rights is absent in much urban studies scholarship that sees governance in a context of rules and decisions that structure relations of power, as well as urban form, very strongly.¹³⁶ In Canada, these rules and structures can be described as a “Westminsterian” parliamentary government, named after the British system from which it was derived: provinces are responsible for land use regulation; municipalities are granted their authority from the provinces; and property rights are not explicitly protected constitutionally in Canada.¹³⁷ However, as Pond notes, these rules and structures are not fixed, nor the outcomes of land use disputes always predictable: “Public policies and the instruments relied upon to deliver them reflect the institutional frameworks within which policy is developed as well as the influence of the political and economic interests clustering around government.”¹³⁸ Policy is not simply a reflection of an institutional framework detached from actors and external influence. Political and economic interests are deeply influential to the formulation and enactment of statutes. The Harris government had to navigate political and economic interests when enacting the ORM legislation. On the other hand, the McGuinty government was committed to developing a greenbelt and used its authority to bypass certain political and economic interests. This is possible because private property rights can be interpreted, and even changed, through legislation, in ways that enable particular government agendas. In this context, private property rights can be strategically changed by government actors, who, as third-phase institutionalists¹³⁹ phrase it, exercise strategic political agency to change institutions, in this case institutions and cultures related to regional land use planning in southern Ontario. Furthermore, legislative power can be used selectively. Canadian provinces have the authority to legislate land use without compensating owners.¹⁴⁰ However, the provinces do not always use this power: they act strategically to balance support and opposition.¹⁴¹ According to Pond, provincial authorities exercise their power strategically for a variety of political and practical reasons:

the province has to be selective about the occasions and extent to which it intervenes in local land-use issues. It cannot afford to run down its political capital indiscriminately with excessive engagements in the messy realities of municipal economic development, even when this might appear necessary to forestall policy drift and uphold system-wide planning goals. Every such intervention in the name of coherent growth management creates a new client of the provincial state with a vested interest in further involvement, while potentially alienating influential

¹³⁶ E.g. Judith Garber & David Imbroscio. “‘The Myth of the North American City’ Reconsidered: Local Constitutional Regimes in Canada and the United States” (1996) 31:5 Urban Aff Rev 595; Sorensen & Hess, *supra* note 33.

¹³⁷ Pond, “Greenbelt Politics,” *supra* note 1 at 239.

¹³⁸ Pond, “Greenbelt Politics,” *supra* note 1 at 238.

¹³⁹ Olsson, *supra* note 6.

¹⁴⁰ Lindgren & Clark, *supra* note 54.

¹⁴¹ Olsson, *supra* note 6.

members of the local growth coalition affected¹⁴²

The local growth coalition seems to have been an important factor in preventing the Harris government from exercising its legislative power over land use more strongly. Gabriel Eidelman notes that the “growth machine” model of land-use planning was alive and well in Ontario in the early 2000s, with the Conservative government in full support of the economic investment, tax revenues, and electoral support that comes from land development.¹⁴³ Influential corporate elites also support politicians and parties more directly. Canadian political scientist Robert McDermid has documented the financial contributions developers and the development industry have made to provincial parties, politicians, and election candidates, and to municipal election candidates in Ontario.¹⁴⁴ It is likely that this political and economic context played a part in four large developers being compensated for harm due to government regulation absent any legal requirement compelling the Harris government to compensate them at all.

But respect for some developers and their private property rights on the ORM was not simply a matter of the Harris government making deals with its “developer friends,” as many suggested to me in interviews.¹⁴⁵ Neither did the Seaton land exchange serve to reinforce the property rights of the exchange developers, even though it did ultimately give them rights to develop land elsewhere. For one, the idea for the land exchange did not originate with developers. Indeed two developers told me they were initially opposed to a land exchange, as they were used to (and preferred) developing in Richmond Hill rather than Pickering.¹⁴⁶ The land exchange represented a complication for developers rather than a simple transfer of development rights. Developers are centrally concerned about risk and delays; the land exchange increased both. The land exchange also created uncertainty for the developers planning to develop their property on the ORM in Richmond Hill. This crisis, from the standpoint of developers, derived from the particular confluence of long-standing environmental activism and opposition to development; the need for the Harris government to resolve a land-based problem quickly in order to maintain public support; and the ultimate recognition by the moraine developers, who had been traditional allies of Conservative provincial governments, that in this case they would not be able to develop all of their moraine lands—a land exchange was not ideal but was better than nothing. Historical institutionalists stress the importance of path dependent processes, arguing that past decisions and events influence the course of subsequent events.¹⁴⁷ Years of activism opposing development on the ORM, the existing relationship with developers and politicians, and the structural element of fixed election cycles must be seen as part of the history leading up to the ORM legislation. But, as is emphasized by third-phase institutionalists, political actors confront constraints, rules, and norms creatively, strategically evaluating which how

¹⁴² Pond, “Greenbelt Politics,” *supra* note 1 at 243.

¹⁴³ Eidelman, *supra* note 109.

¹⁴⁴ Robert MacDermid, “Money and the 1999 Ontario Election” (1999) 7:6 *Canada Watch* 128; Robert MacDermid, “Funding Municipal Elections in the Toronto Region” (Paper presented at the Annual Canadian Political Science Association Conference, 3 June 2006); Robert MacDermid, *Funding City Politics: Municipal Campaign Funding and Property Development in the Greater Toronto Area* (Toronto: The Center for Social Justice, 2009).

¹⁴⁵ E.g. Environmental Activist Interview, 22 May 2013.

¹⁴⁶ Developer Interviews, 26 April 2013; 15 May 2013.

¹⁴⁷ E.g. Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” (2000) 94:2 *American Political Science Review* 251.

power can be mobilized to achieve desired ends.¹⁴⁸ The Harris government acted very strategically, including developers on the ORM advisory panel and making special deals with the largest and most powerful developers, a move that also appeased some of the environmental activists on the ORM advisory panel. Although critics of the land exchange suggest that developers “got all they deserved and more,”¹⁴⁹ this is not entirely accurate. Developers were not clear winners on the ORM. Many had their lands entirely frozen, preventing further development, and those that received land in Pickering have not yet begun development (as of April 2017).

Conversely, greenbelt legislation was not simply the result of the McGuinty government exercising its executive power over private property rights in the name of the public interest (or to fulfill an election promise). Even though the greenbelt created uncertainty for many landowners, developers and other land interests were not clear losers at the wrong end of a strong provincial power over land use and property. Many firms’ landholdings adjacent to the greenbelt increased significantly in value after the greenbelt legislation was enacted.¹⁵⁰ Many developers I interviewed consider this increase in value to be a direct result of the legislation, as the greenbelt created a perceived shortage in developable land in the Toronto region, especially long term land that many developers attempt to bank years ahead of development. In this sense, the greenbelt indeed influenced the property rights of developers, but it did so in a way that made their land more valuable, not less. Furthermore, although development of housing on greenbelt lands is more difficult as a result of greenbelt legislation, many other types of activities, such as soil dumps, airports, and wind turbines have been permitted to continue.¹⁵¹

The example of land use conflict in the Toronto region, and the intersections of these conflicts with political agendas and the adjudication of property rights illustrate the politics of property rights in Canada. Institutional theorist remind us that governance, including legal processes governing land use, is deeply shaped by history, local cultures, actors, and ideas.¹⁵² Legal and governance processes are also sites of political and strategic action.¹⁵³ This is especially the case in Canadian land use planning, where land-based property disputes are often shifted away from the courts, negotiated instead through local disputes, local political deal-making, and the mobilization of civil society actors and agencies.¹⁵⁴ The trajectories of land use conflict and resolutions are often difficult to predict, as illustrated by the very different

¹⁴⁸ Olsson, *supra* note 6.

¹⁴⁹ Environmental lawyer interview, 8 May 2013.

¹⁵⁰ Developer interview, 6 August 2014.

¹⁵¹ E.g. Steve Gilchrist, “A new threat to the Oak Ridges Moraine,” *Toronto Star* (6 January 2014) online: <thestar.com/opinion/commentary/2014/01/06/a_new_threat_to_the_oak_ridges_moraine.html> [perma.cc/X4XU-FCXW]; Ontario Soil Regulation Task Force, *Soil dumps still don't belong in the greenbelt*, online: <lakeridgecitizens.ca/lccw/wp-content/uploads/2014/03/Soil-Dumps-Still-Dont-Belong-in-the-Greenbelt-cwAnnex1.pdf> [perma.cc/6UV7-EHKB]; Charles Loopstra, *Site Alteration By-Laws and the Dirty Business of “Clean” Fill*, IMLA in Canada 2014 L0334101.4 (Toronto: International Municipal Lawyers Association, 2014); *The Corporation of the Township of Scugog v 2241960 Ontario Inc.* O/A Earthworx Industries, 2011 ONSC 1598.

¹⁵² Lowndes & Roberts, *supra* note 6.

¹⁵³ Olsson, *supra* note 6.

¹⁵⁴ Anneke Smit & Marcia Valiante, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2015); Douglas Harris, “A Railway, a City, and the Public Regulation of Private Property: *CPR v City of Vancouver*” in Eric Tucker, James Ziff & Bruce Muir, eds, *Property on Trial: Canadian Cases in Context*, (Toronto: Osgoode Society for Canadian Legal History and Irwin Law, 2012) 455 at 475.

procedures and outcomes surrounding the ORM conflicts versus development of a greenbelt in the Toronto region. In other words, the precise outcomes of private property disputes rely heavily on the local place-based actors, political contexts, and pre-existing relationships between state and non-state actors.